

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MICHAEL L. GARDNER and DEPARTMENT OF THE NAVY,  
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 02-845; Submitted on the Record;  
Issued July 25, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits on the grounds that he no longer had any orthopedic and neurological residuals of his January 6, 1986 employment injury.

On January 22, 1986 appellant, then a 30-year-old machinist, filed a traumatic injury claim alleging that on January 6, 1986, while working on a gate valve, he attempted to stand up and he hit an overhead beam, which knocked him unconscious. He stopped work on January 7, 1986 and he has not returned to work.

The Office accepted appellant's claim for neck sprain, lumbosacral sprain, head contusions and headache.

After reviewing the evidence of record, the Office referred appellant to Dr. Robert Aiken, a Board-certified neurologist, and Dr. Richard J. Mandel, a Board-certified orthopedic surgeon, for a second opinion examination by letters dated October 29, 1998.

Dr. Aiken submitted a December 13, 1998 report finding that appellant had post-traumatic headaches, cervical strain and lumbar strain due to his employment injury. He opined that these conditions did not preclude appellant from employment. Dr. Aiken recommended that appellant undergo a functional capacity evaluation to determine the degree of disability.

Dr. Mandel submitted a January 13, 1999 report finding that appellant had recovered from his employment-related cervical and lumbosacral sprain/strain. He stated that further treatment was not necessary and that appellant could return to full-duty work and regular activities without restriction. In supplemental letters dated March 18, 1999, April 22 and 24, 2000, Dr. Mandel stated that his previously expressed opinions remained unchanged.

Dr. Aiken submitted a supplemental letter dated April 25, 1999 indicating that the results of the functional capacity evaluation were inconclusive due to exaggerated pain behavior and

self-limiting behavior by appellant. He concluded that appellant had persistent lumbosacral and cervical sprain and strain and post-traumatic headaches that were not work limiting but remained a chronic problem. Dr. Aiken further opined that these conditions were a direct outcome of appellant's January 1986 employment injury. He stated that there was no causal relationship between appellant's injury and his claims of blackouts. Dr. Aiken advised appellant against driving due to his reported history of blackouts.

Dr. David Seltzer, a chiropractor, submitted an October 25, 1999 report indicating that appellant had restrictive range of motion and palpable tenderness. In a work capacity evaluation form dated October 26, 1999, he stated that appellant could not work and noted his physical restrictions.

The Office found a conflict in the medical opinion evidence between Drs. Seltzer, Mandel and Aiken as to whether appellant was disabled for work due to his work-related injury and referred appellant to Dr. Marcia Halpern, a Board-certified neurologist, and Dr. Victor R. Frankel, a Board-certified orthopedic surgeon, for impartial orthopedic and neurologic medical examinations.

Dr. Frankel submitted a September 5, 2000 report revealing a history of appellant's January 6, 1986 employment injury and medical treatment, his findings on physical examination and a review of appellant's medical records. He noted that based on a review of appellant's history it was inconsistent in that there was a nonorganic basis of ongoing symptoms and no specific orthopedic pathology to account for persistent and newly developing symptoms which appellant related to his employment injury. Dr. Frankel stated that previous physicians also noted this inconsistency. He opined that, based on his evaluation, there was no evidence to account for appellant's peculiar behavior and reported ongoing symptoms.

In a January 11, 2001 report, Dr. Halpern provided a history of appellant's January 6, 1986 work-related injury, medical treatment and family background, his complaints of numbness and pain in his upper and lower extremities and migraine headaches and blackouts that occurred without warning. She also provided her findings on physical examination and noted a review of appellant's medical records. Dr. Halpern stated that there were inconsistencies in appellant's current neurological examination, which had been documented by other physicians over the last 12 years. She further stated that appellant's history of pain had been attributed to his 1986 employment-related lumbosacral strain and post-traumatic cephalgia. Dr. Halpern also stated, however, that appellant's current neurological examination did not provide any objective findings suggestive of radiculopathy or focal nerve root entrapment to explain his persistent symptoms. She opined that within a medical degree of certainty, appellant did not continue to suffer residuals from his employment injury. Dr. Halpern further opined that there was not any evidence that the January 6, 1986 employment injury was currently active and causing objective findings. She concluded that there was no medical reason why continued future physical therapy and/or chiropractic care was appropriate.

The Office issued a notice of proposed termination of compensation on March 12, 2001 based on the reports of Drs. Frankel and Halpern.

In response to the notice of proposed termination, appellant submitted an April 12, 2001 letter from his attorney contending that the evidence of record was sufficient to establish an employment-related emotional condition and residuals of his employment-related injury and that the statement of accepted facts reviewed by referral physicians was inaccurate.

The Office referred appellant to Dr. Harry Doyle, a Board-certified psychiatrist, to determine whether he had any psychiatric disability causally related to his employment injury. By reports dated May 10 and June 11, 2001, Dr. Doyle found that appellant suffered from employment-related pain disorder associated with psychological factors causing disability for any employment.

Dr. Seltzer submitted an undated report providing a history of the January 6, 1986 employment injury, appellant's complaints of headaches and cervical, lumbosacral and bilateral upper extremity pain. He noted appellant's initial diagnoses, his findings on objective examination and a review of appellant's medical history. Dr. Seltzer diagnosed C8-T1 radiculopathy of the right upper extremity, carpal tunnel syndrome of the right upper extremity, a bulging disc at L3-4 and L5-S1 of the lumbar spine and degenerative disc disease with broad-based disc bulging at L4-5. He opined that appellant's injuries and resultant functional deficiencies were a direct result of his January 6, 1986 employment injury. Dr. Seltzer further opined that appellant had sustained a permanent physical impairment of the body as a whole based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. He concluded that appellant was being released from his medical care.

By decision dated August 24, 2001, the Office terminated appellant's medical compensation on the grounds that he no longer had any orthopedic or neurological residuals of his employment injury. The Office, however, accepted that appellant's claim for pain disorder associated with psychological factors and authorized payment of compensation benefits for this condition.<sup>1</sup>

Appellant, through his attorney, requested a review of the written record. In a November 3, 2001 letter, appellant's attorney argued that the reports of Drs. Frankel and Halpern were insufficient to terminate appellant's compensation benefits.

In a February 8, 2002 decision, the hearing representative affirmed the Office's decision.

The Board finds that the Office properly terminated appellant's compensation benefits on the grounds that he no longer had any orthopedic and neurological residuals of his January 6, 1986 employment injury.

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>2</sup> Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation

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<sup>1</sup> The issue in this case centers on the accepted orthopedic and neurological conditions. Appellant makes no contention that he continues to suffer from the accepted pain and psychiatric conditions and the Office has not issued a decision terminating his compensation benefits for these conditions.

<sup>2</sup> *Betty Regan*, 49 ECAB 496, 501 (1998).

without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>3</sup>

In this case, the Office relied on the opinions of Drs. Frankel and Halpern, as impartial medical examiners, to conclude that appellant no longer had any orthopedic and neurological residuals and disability due to his January 6, 1986 employment injury. Section 8123(a) of the Federal Employees' Compensation Act<sup>4</sup> states that if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination. The Office had declared a conflict presumably between the opinions of Drs. Seltzer, Aiken and Mandel. Dr. Seltzer is a chiropractor. Section 8101(2) of the Act recognizes a chiropractor as a physician "only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist...."<sup>5</sup> At the time Dr. Seltzer rendered the opinion that appellant had residuals of his employment injury and he could not work, Dr. Seltzer did not diagnose subluxation as demonstrated by x-ray. He, therefore, does not qualify as a physician within the meaning of section 8101(2) of the Act and his report cannot be considered competent medical evidence. Accordingly, the Office improperly declared a conflict in the medical opinion evidence. The conflicting evidence did not come from appellant's treating "physician" since there is no evidence establishing that Dr. Seltzer is a "physician" under the Act. Thus, the reports from Drs. Frankel and Halpern are not entitled to special weight as reports of impartial specialists. Rather, their reports constitute reports from second opinion physicians.

Dr. Frankel's opinion that there were no objective findings to account for appellant's ongoing orthopedic symptoms and Dr. Halpern's similar opinion that there were no objective findings to explain appellant's ongoing neurological symptoms were rationalized based on an accurate factual and medical background. Their reports provided a sufficient basis for the Office's decision to terminate appellant's compensation. Because the medical evidence shows that appellant no longer suffers from his accepted employment injuries the Office met its burden of proof in terminating compensation benefits.

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<sup>3</sup> *Raymond C. Beyer*, 50 ECAB 164, 168 (1998).

<sup>4</sup> 5 U.S.C. § 8123(a).

<sup>5</sup> 5 U.S.C. § 8101(2); *see Marjorie S. Geer*, 39 ECAB 1099, 1101-02 (1988).

The February 8, 2002 and August 24, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC  
July 25, 2003

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member